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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 In re WYNN RESORTS, LIMITED
8 DERIVATIVE LITIGATION,

Case No.: 2:18-cv-00293-KJD-CWH

ORDER

9 This Order Relates to: All Actions
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11 Presently before the Court is Defendants' Motion to Stay Shareholder Derivative Action
12 (#51). Plaintiffs filed a response in opposition (#62) to which Defendants replied (#71). Also
13 before the Court is Plaintiffs' Motion to Enter Order Denying Defendants' Motion to Dismiss
14 (#72).¹

15 I. BACKGROUND

16 Shortly after publication of an article in the *Wall Street Journal* on January 26, 2018,
17 discussing the alleged misconduct by officers and directors of Wynn Resorts, Plaintiffs Rickey
18 A. Broussard (Case No. 2:18-CV-00293) and the City of Dearborn Heights Act 345 Police &
19 Fire Retirement System (Case No. 2:18-CV-00439) filed derivative complaints on behalf of
20 Wynn Resorts. On March 29, 2018, this Court ordered consolidation of the Broussard and
21 Dearborn actions under the caption In re Wynn Resorts, Limited Derivative Litigation, Case No.
22 2:18-CV-00293, and appointed the City of Dearborn Heights as Lead Plaintiff in the
23 consolidated action. ECF No. 33 (Mar. 29, 2018 Consolidation Order). On April 27, 2018,
24 Plaintiffs filed a consolidated amended complaint (#38) ("Consolidated Complaint").

25 The Consolidated Complaint alleges that the directors of Wynn Resorts knew about and
26 did not disclose an alleged pattern of sexual misconduct. See generally ECF No. 38 ¶¶ 1-14.

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28 ¹ The state court orders are not final orders on the merits that have preclusive effect mandating that this Court deny the motions to dismiss and to stay. Accordingly, the Court denies the Motion to Enter Order (#72).

1 Particularly, Plaintiffs contend that the directors of Wynn Resorts breached their fiduciary duties
2 by causing Wynn Resorts “to issue public reports to shareholders and gaming regulators alike
3 that concealed adverse material information about the Company’s namesake, Steve Wynn.
4 Defendants’ false and misleading statements and material omissions breached their fiduciary
5 duties and related legal obligations.” Id. ¶ 11. According to Plaintiffs, the directors “exposed
6 Wynn [Resorts] to billions of dollars of losses and risks of loss” associated with the federal
7 securities class action and an application for a gaming license. See id. In addition to alleging
8 purported breaches of fiduciary duties, Plaintiffs also allege that the directors of Wynn Resorts
9 violated Section 14(a) of the Securities Exchange Act of 1934 (the “Exchange Act”) and Rule
10 14a-9 by making false or misleading statements in proxy statements that failed to disclose a
11 supposed pattern of sexual harassment and failing to disclose that information to gaming
12 regulators. Id. ¶¶ 151-154.

13 This action names as defendants the former Chief Executive Officer (“CEO”) and
14 Chairman of Wynn Resorts, Stephen A. Wynn (“Wynn”), former Chief Financial Officer
15 (“CFO”) and current CEO Matthew Maddox (“Maddox”), General Counsel and Senior Vice
16 President Kimmarie Sinatra, and current or former directors John J. Hagenbuch, Jay L. Johnson,
17 Robert J. Miller, Patricia Mulroy, Clark T. Randt, Jr., Alvin V. Shoemaker, J. Edward Virtue, D.
18 Boone Wayson, and Ray Irani. Id. ¶¶ 25-36. The complaint also names Wynn Resorts as a
19 nominal defendant. Id. ¶¶ 22-24.

20 On February 20, 2018, five days after the present derivative action was filed, Plaintiffs
21 John V. Ferris and Joann M. Ferris filed a federal securities class action, Ferris v. Wynn Resorts,
22 No. 2:18-CV-00479-GMN-CWH, against Wynn Resorts and individual defendants Steve Wynn,
23 Matthew Maddox, current CFO Craig Billings, and former CFO Stephen Cootey. Similar to this
24 derivative action, the complaint in the securities class action alleges these defendants violated
25 certain federal securities laws—Sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5—
26 by allegedly failing to disclose a “pattern of sexual misconduct.” Id. ¶ 4. The securities complaint
27 alleges that in numerous public filings, the defendants “had a duty” to disclose details about
28 ongoing alleged sexual misconduct, and that their failure to do so resulted in artificially inflated

1 prices for Wynn Resorts stock. Id. ¶¶ 4, 73. The plaintiff claims that when “the truth” was
2 supposedly revealed in the Wall Street Journal article, Wynn Resorts stock price dropped,
3 causing investors to suffer losses. Id. ¶¶ 5, 6, 11, 50-52. Just as in this derivative case, the issues
4 raised by the securities class action concern what information the individual defendants had and
5 when, and whether they had any duty to disclose it. See, e.g., id. ¶¶ 4, 23, 71; see also id. ¶ 62
6 (identifying among the issues to be resolved in the securities case whether the individual
7 defendants caused the company to issue false and misleading statements).

8 Defendants have now moved to stay this action asserting that proceeding when the
9 related securities class action is pending is not in Wynn Resorts’ best interest or its shareholders’
10 interest. Defendants argue that proceeding would divert resources from the securities class
11 action. Moreover, Defendants argue that Plaintiffs in this action, nominally Wynn Resorts, will
12 be seeking to prove the very allegations that it is defending against in the securities class action.
13 This will require Plaintiffs to discredit key witnesses in the securities class action who are
14 needed for Wynn Resorts’ defense in this action.

15 II. STANDARD FOR ISSUING A STAY

16 A district court has the inherent power to stay cases to control its docket and promote the
17 efficient use of judicial resources. Landis v. North Am. Co., 299 U.S. 248, 254-55 (1936);
18 Dependable Highway Exp., Inc., v. Navigators Ins. Co., 498 F.3d 1059, 1066 (9th Cir. 2007).
19 When determining whether a stay is appropriate pending the resolution of another case – often
20 called a “Landis stay” – the district court must weigh: (1) the possible damage that may result
21 from a stay, (2) any “hardship or inequity” that a party may suffer if required to go forward, and
22 (3) “and the orderly course of justice measured in terms of the simplifying or complicating of
23 issues, proof, and questions of law” that a stay will engender. Lockyer v. Mirant Corp., 398 F.3d
24 1098, 1110 (9th Cir. 2005). However, contrary to Plaintiff’s argument, the Court need not find
25 “exceptional circumstances[.]” Intel Corp. v. Advanced Micro Devices, 12 F.3d 908, 912 (9th
26 Cir. 1993) (analyzing a stay under the Colorado River doctrine which only applies when staying
27 a federal action in favor of an ongoing state court proceeding.) In this action, a stay would be
28 issued in favor of the ongoing, federal securities class action, not the concurrently proceeding

1 state court derivative actions.

2 III. ANALYSIS

3 In this action, the factors weigh in favor of a Landis stay. The hardship and inequity
4 Wynn Resorts would suffer should this case be permitted to proceed now weigh strongly in favor
5 of a stay. A derivative suit allows shareholders to bring claims to enforce a company's rights
6 against its directors. Fed. R. Civ. P. 23.1. In bringing such claims, the derivative plaintiffs are
7 seeking to act as the company's fiduciaries and have a duty to act in the company's best interest.
8 See In re Ormat Techs., Inc. Deriv. Litig., 2011 WL 3841089, at *5 (D. Nev. Aug. 29, 2011)
9 (staying derivative case in favor of pending securities class action); see also In re STEC, Inc.
10 Deriv. Litig., 2012 WL 8978155, at *4 (C.D. Cal. Jan. 11, 2012) (same, noting that a plaintiff
11 bringing a derivative action is a "fiduciary and has a duty to act in the company's best interest").

12 Litigating the derivative action would divert the company's financial and management
13 resources from the pending securities class action. Moreover, proceeding with this action now
14 would require Plaintiffs to prove the very same alleged misconduct that is the basis of the
15 securities class action, and to attack the credibility of witnesses also named as defendants in that
16 action. These efforts—whether or not meritorious or successful—could undermine Wynn
17 Resorts' defense of the securities class action, and courts have stayed derivative actions in favor
18 of securities class actions for this reason. See, e.g., In re Ormat, 2011 WL 3841089, at *4
19 (staying federal derivative action in part because "Defendants are witnesses that [the company]
20 will rely upon in the Securities Class Action"); see also Rosenblum v. Sharer, 2008 WL
21 9396534, at *23-24 (C.D. Cal. Jul. 28, 2008) (staying derivative action because "it seems likely
22 that the officers and director Defendants in the derivative action would be important witnesses
23 in the securities class action, [which] could potentially result in the liability of the officers being
24 imputed to the corporation"; and "denying a stay will potentially cause substantial harm to [the
25 company], the party on whose behalf this derivative action has been brought"); Cucci v.
26 Edwards, 2007 WL 3396234, at *2 (C.D. Cal. Oct. 31, 2007) (staying derivative action because
27 it "would likely conflict with [the company's] defense" of a securities class action, because
28 plaintiffs "would need to prove allegations that would seriously undermine [the company's]

1 defense of the class action”); Breault v. Folino, 2002 WL 31974381, at *2 (C.D. Cal. Mar. 15,
2 2002) (holding that the company “would be harmed by Plaintiffs’ pursuit of this derivative action
3 now” because “Defendants are likely witnesses who [the company] will rely upon in the pending
4 cases” and “Plaintiffs will need to undermine Defendants’ credibility to pursue this action”); In
5 re STEC, 2012 WL 8978155, at *4 (“Courts generally stay a shareholder derivative suit until the
6 culmination of a securities class action when the cases arise from the same factual allegations
7 and the evidence in the former could jeopardize the company’s defense in the latter.”).

8 These same considerations apply in the present actions. There is no doubt that the federal
9 securities claims are almost identical and will require nearly identical evidence to prove their
10 claims. This puts the nominal Plaintiff, Wynn Resorts, in the position of attempting to prove the
11 claims it is defending in the securities class action. To “avoid undermining the company’s
12 defense” in the class action, this factor weighs in favor of a stay. Id.

13 Further, allowing simultaneous prosecution of this action and the federal securities class
14 action will lead to duplicative litigation and unnecessary waste or use of resources. Not only are
15 these factual allegations virtually identical, but the claims themselves overlap. The alleged
16 factual basis for Plaintiffs’ 14(a) claim is the same as the basis for the alleged violations of
17 Section 10(b) and 20(a) in the securities class action case: namely, Defendants’ purported
18 omission of adverse material information about alleged sexual misconduct. See ECF No. 38 ¶
19 152, Ex. 1 ¶ 4. The legal elements of Section 10(b) and 14(a) claims also overlap almost entirely:
20 both require plaintiffs to prove a material misrepresentation or omission, reliance upon the
21 misrepresentation or omission, and a causal connection between the misrepresentation or
22 omission and plaintiffs’ claimed injury. See Rudolph v. UTStarcom, 560 F. Supp. 2d 880, 887,
23 891 (N.D. Cal. 2008) (identifying elements of Section 10(b) and 14(a) claims); see also City of
24 Monroe Employees Ret. Sys. v. Bridgestone Corp., 399 F.3d 651, 674 (6th Cir. 2005) (noting
25 that the SEC has “promulgated the same rule” for both 10(b) and 14(a) and that “violations occur
26 under each section whenever a statement is false or a material omission makes the statements
27 which are made misleading”) (citing 17 C.F.R. §§ 240.10b-5, 240.14a-9).

1 Staying this action would give all parties more complete information regarding whether
2 and how Plaintiffs might pursue their claims which promotes the orderly course of justice. For
3 this reason, “staying the Shareholder Derivative Action pending resolution of the [securities class
4 actions] would promote judicial economy.” Cucci, 2007 WL 3396234, at *2; see also In re
5 STEC, 2012 WL 8978155, at *7 (observing that if a company or its directors are exonerated on
6 the grounds that they did not issue materially false or misleading statements, “it is unclear what,
7 if anything, would be left of the derivative action”); Rosenblum, 2008 WL 9396534, at *8. In
8 fact, Plaintiffs also allege that Wynn Resorts may be harmed should an ongoing investigation by
9 the Massachusetts Gaming Commission result in the forced sale of the company’s gaming
10 license for the Encore Boston Harbor. See ECF No. 38 ¶¶ 42, 66-67, 111. This allegation, too,
11 favors a stay, given that the purported harm has not happened. The Massachusetts Gaming
12 Commission has scheduled a three-day adjudicatory hearing in April. Should the gaming
13 commission affirm the company’s entitlement to its license, this premise for relief is moot. If not,
14 the proceedings before the commission will have crystalized many of the relevant facts necessary
15 for this derivative action.

16 Finally, the prejudice Plaintiff may suffer as a result of the delay does not outweigh the
17 potential hardship or inequity that may befall Wynn Resorts and does not outweigh the increase
18 in the “orderly course of justice” that will come from the increased judicial economy and the
19 crystallization of the factual issues that will occur. While justice delayed is justice denied, should
20 the shareholder’s securities claims be dismissed, Plaintiffs may be spared the expense of
21 pursuing doomed claims. See Rosenblum, 2008 WL 9396534, at *; Baca v. Insight Enterprises,
22 Inc., 2010 WL 2219715 at *5 (Del. Ch. June 3, 2010) (“Because [the derivative] lawsuit seeks
23 indemnification for losses resulting from [the federal securities action], a rational stockholder
24 plaintiff, free from the compulsion to win a first-to-file sweepstakes, would wait until after a
25 ruling on a motion to dismiss [the securities action] before commencing a derivative suit”).
26 Therefore, the Court grants the motion to stay.

27 IV. CONCLUSION

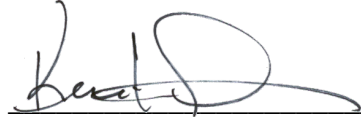
28 Accordingly, IT IS HEREBY ORDERED that Defendants’ Motion to Stay Shareholder

1 Derivative Action (#51) is **GRANTED**;

2 IT IS FURTHER ORDERED that Plaintiffs' Motion to Enter Order Denying Defendants'
3 Motion to Dismiss (#72) is **DENIED**;

4 IT IS FURTHER ORDERED that all other outstanding motions are **DENIED without**
5 **prejudice as moot** (they may be renewed after the stay is lifted).

6 Dated this 29th day of March, 2019.

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9 Kent J. Dawson
10 United States District Judge
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